

June 19th, 2017

Submitted via electronic form on FOIA online web site
<https://foiaonline.regulations.gov>

Regional Freedom of Information Officer
U.S. EPA, Region 10
Office of Ecosystems, Tribal and Public Affairs
1200 6th Avenue ETPA-124
Seattle, WA 98101

Re: Freedom of Information Act Request seeking information related to EPA Region 10's communications with the State of Idaho Dept. of Environmental Quality and/or City of Sandpoint concerning revision and reissuance of the NPDES permit for the Sandpoint Wastewater Treatment Plant, Permit No: ID0020842

To Whom It May Concern:

Lake Pend Oreille Waterkeeper (LPOW) hereby requests records, as described below, pursuant to the Freedom of Information Act (FOIA). 5 U.S.C. § 552 *et seq.* LPOW requests disclosure of all requested records including any and all nonexempt portions of records that are otherwise determined to be exempt from review under the FOIA. 5 U.S.C. §552(b). Specifically, we request any and all records that relate to and/or were produced as a result of the following within the time of January 1, 2008 to present:

1. Discussion and communication between EPA Region 10 (R10) and the State of Idaho Dept. of Environmental Quality (IDEQ) and/or the City of Sandpoint concerning proposed revisions and reissuance of the Sandpoint Wastewater Treatment Plant (WWTP) NPDES permit;
2. Discussion and communication between R10 and IDEQ and/or the City of Sandpoint concerning proposed or revised Technology Based Effluent Limits (TBELs) and/or Water Quality Based Effluent Limits (WQBELs) for the Sandpoint WWTP NPDES permit;
3. Discussion and communication between R10 and IDEQ and/or the City of Sandpoint concerning proposed or revised flow and/or discharge volume for the Sandpoint WWTP NPDES permit;
4. Reports, studies, or communication of or about such items between R10 and IDEQ and/or the City of Sandpoint concerning rationale(s) supporting proposed revisions and reissuance of the Sandpoint WWTP NPDES permit;
5. Discussion and communication between R10 and the IDEQ and/or the City of Sandpoint concerning the Sandpoint WWTP and any relationship(s) to Pend Oreille River impairments, including the following existing Total Maximum Daily Loads (TMDLs) for the Pend Oreille Lake to Priest River segment of the Pend Oreille River:

- dissolved gas supersaturation
 - water temperature
6. Discussion and communication between R10 and the IDEQ and/or the City of Sandpoint concerning the Sandpoint WWTP and its impact(s) or effects on the nutrient status of the Pend Oreille River, and specifically with respect to phosphorous impairment.

This request is not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you, or your office, have destroyed or decide to withhold any documents that could be reasonably construed to be responsive to this request, we ask that you indicate this fact and the reasons therefore in your response.

LPOW looks forward to a response and determination from your office within twenty working days of receipt of this request consistent with 5 U.S.C. § 552(a)(6) of the FOIA, and 40 C.F.R. § 2.104 of EPA's regulations.

If this request is denied in whole or in part, we request a detailed description of, at a minimum: (1) a detailed index/list of the records withheld, including the name of the record, the subject of the record, the author of the record, and the date of the record; as well as (2) EPA's basis for withholding the records. *Church of Scientology Intern. v. U.S. Dept. of Justice*, 30 F.3d 224, 227 (1st Cir. 1994); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied* 415 U.S. 977 (1974).

EXEMPT RECORDS

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for LPOW to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder to LPOW as required by 5 U.S.C. § 552(b).

Finally, even if you ultimately conclude that the requested records are exempt from mandatory disclosure under FOIA, we request that you disclose them nevertheless, pursuant to the Agency's powers of discretionary release under the FOIA. Such disclosure would serve the public interest of educating citizens regarding the operations and activities of R10 and IDEQ regarding the

water quality programs and important pollution mitigation plans that are the subject of this request.

This issue was directly addressed in the Guidance provided by the Department of Justice's Office of Information Policy ("OIP"): President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines *Creating a "New Era of Open Government."* The OIP noted the initiatives embodied both by the Presidential and Attorney General's mandates and instructed that:

The key frame of reference for this new mind set is the purpose behind the FOIA. The statute is designed to open agency activity to the light of day. As the Supreme Court has declared: "FOIA is often explained as a means for citizens to know what 'their Government is up to.'" *NARA v. Favish*, 541 U.S. 157, 171 (2004) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The Court elaborated that "[t]his phrase should not be dismissed as a convenient formalism." *Id.* at 171-72. Rather, "[i]t defines a structural necessity in a real democracy." *Id.* at 172. The President's FOIA Memoranda directly links transparency with accountability which, in turn, is a requirement of a democracy. The President recognized the FOIA as "the most prominent expression of a profound national commitment to ensuring open Government." Agency personnel, therefore, should keep the purpose of the FOIA -- ensuring an open Government -- foremost in their mind.

Second, agencies should be mindful not to review records with the sole purpose of determining what can be protected under what exemption. Instead, records should be reviewed in light of the presumption of openness with a view toward determining what can be disclosed, rather than what can be withheld. For every request, for every record reviewed, agencies should be asking "Can this be released?" rather than asking "How can this be withheld?"

Third, in keeping with the Attorney General's directive, agencies "should not withhold information simply because [they] may do so legally." Information should not automatically be withheld just because an exemption technically or legally might apply. Indeed, if agency personnel find themselves struggling to fit something into an exemption, they should be aware of the President's directive that "[i]n the face of doubt, openness prevails."

For the reasons above we anticipate that the EPA will release the requested information.

FEE WAIVER REQUEST

We ask that you waive all copy, clerical and other fees associated with providing information responsive to this request. The FOIA requires agencies to furnish documents to information requesters free of charge, or at a reduced rate, "if disclosure of the information is in the public interest." 5 U.S.C. § 552(a)(4)(A)(iii). Such disclosure is in the public interest if "it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *Id.* While a FOIA requester

bears the initial burden of making a prima facie showing of entitlement to a fee waiver, *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284-85 (9th Cir.1987), once that threshold has been satisfied, the burden shifts back to the agency to substantiate denial of a waiver request. The prima facie test is not intended to be a difficult one to satisfy, as the Ninth Circuit has held a requester meets this burden in situations in which “They identified why they wanted the [requested information], what they intended to do with it, to whom they planned on distributing it. . .” *Friends of the Coast Fork v. BLM*, 110 F.3d 53, 55 (9th Cir.1997).

As you consider our fee waiver request, please recall that in enacting FOIA, Congress was “principally interested in opening administrative processes to the scrutiny of the press and public.” *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 17 (1974). To further this policy, FOIA requires that documents must be provided without charge or at a reduced charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

LPOW works to solve the environmental problems that threaten waterways, natural resources, and communities of the Clark Fork/Pend Oreille watershed in Northern Idaho. LPOW advocates using law, economics, science and public education to design and implement strategies that conserve natural resources, protect public and watershed health, and promote vital communities in our region. LPOW has an established advocacy center in Sandpoint, ID and is a leader in addressing important water policy affecting Lake Pend Oreille, its tributaries, and the Pend Oreille River’s quality. LPOW is a non-profit, member-supported organization with no commercial interest in obtaining the requested information. Instead, LPOW intends to use the requested information to inform the public, so the public can understand and meaningfully engage in EPA’s decision making concerning revising and reissuing a NPDES permit for the Sandpoint WWTP under the Clean Water Act.

As explained more fully below, the above-referenced FOIA request satisfies the factors listed in the EPA’s governing regulations for “Waiver or Reduction of Fees” as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the re-quester.” 5 U.S.C. § 552(a)(4)(iii), *see also* 40 C.F.R. § 2.107(l)(1).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.” 40 C.F.R. § 2.107(k)(2)(i).

The requested records relate to EPA R10’s interaction with IDEQ, an entity not only subject to regulation by the Agency, but for whom R10 still exercises Clean Water Act permitting authority. Further, responsive documents will necessarily pertain to EPA’s implementation of the federal Clean Water Act and FOIA. These undertakings are unquestionably “identifiable operations or activities of the government.”

The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or

activities of the government. There can be no question that this is such a case.

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii).

The Freedom of Information Act Guide makes it clear that, in the Department of Justice’s view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are “likely to contribute” to an understanding of EPA’s decisions because they are not otherwise in the public domain and are not accessible other than through this FOIA request. As R10 administers the Clean Water Act throughout Idaho, and whereas there exists long-standing and evolving water pollution issues in both the Pend Oreille River and Lake Pend Oreille, and whereas the Sandpoint WWTP is a primary point-source discharger of pollutants of concern to those waters, it is important for information relating to government considerations and rationales involving pollution limits be made available to the public.

It is equally important that the nature and scope of the Agency’s relationship with IDEQ and the City of Sandpoint, and rationale for any encouragement or support of proposed changes to the Sandpoint WWTP permit, be subject to public oversight. Insofar as R10 will in fact be the permit writer for the Sandpoint WWTP NPDES permit, the information sought will facilitate meaningful public participation in implementing tangible, discrete Clean Water Act based pollutant limits for local waterways in Idaho, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of the EPA R10’s decisionmaking process with regard to revising and reissuing the Sandpoint WWTP NPDES permit.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester — *i.e.*, expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined. 40 C.F.R. § 2.107(l)(2)(iii).

The Environmental Protection Agency (EPA) has established national water quality standard that each state is required to meet for each of its water bodies. Further, EPA has encouraged states to adopt specific numeric criteria that better protect waterways and designated uses and assist states in implementing their delegated Clean Water Act authorities. Certain water bodies are too polluted to meet water quality standards; these waters are referred to as impaired, and become a priority for state and/or EPA regulation. As a result the state is required to implement a TMDL that enforces stricter control on discharges going into the water than those waters that are not impaired. Water quality standards provide the “floor” of minimum water quality a waterway must maintain; in turn, NPDES permits provide a primary means of ensuring dischargers do not discharge pollutants above and beyond their permit terms and in so doing potentially violate water quality standards. Insofar as R10 still administers Idaho’s CWA permitting program, EPA has a detailed understanding of the water pollution problems confronting Idaho and its communities.

LPOW is closely involved with water quality permitting and water pollution clean-up within the Clark Fork/Pend Oreille watershed. LPOW is interested in reviewing and potentially submitting comments and research on all aspects of expected, upcoming revisions and reissuance of the Sandpoint WWTP NPDES permit because it is a primary point source discharging pollutants of concern to the Pend Oreille River. LPOW is more generally interested in the performance of Idaho Integrated Reports pursuant to Section 303(d) of the Clean Water Act, in the issuance of National Pollutant Discharge Elimination System (NPDES) permits, and in the context of TMDLs, for impaired Idaho waterways and threatened waterways, and how regulatory requirements are tools for cleaning up or protecting local waterways. LPOW is experienced and capable in its use of the FOIA and is well-suited to evaluate any action(s) by R10's and IDEQ in terms of altering terms and conditions of the Sandpoint WWTP NPDES permit.

LPOW disseminates the information it receives through FOIA regarding government operations and activities through a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, posting on LPOW's website, emailing and list serve distribution to members. Each month, LPOW's website receives approximately 1,800 visits. In addition, LPOW disseminates information obtained through FOIA through comments to administrative agencies, and where necessary, through the judicial system. LPOW has published, posted, and disseminated numerous summaries and articles on state implementation of the federal Clean Water Act, including the importance of strong, protective water quality standards and consistent state enforcement of Clean Water Act mandates.

LPOW unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the "public-at-large."

4. The disclosure must contribute "significantly" to public understanding of government operations or activities. The public's understanding must be likely to be enhanced by the disclosure to a significant extent. 40 C.F.R. § 2.107(l)(2)(iv).

There is currently little information publicly available regarding EPA R10's consideration, comments and communication with IDEQ and/or the City of Sandpoint concerning revisions or reissuance of the Sandpoint WWTP NPDES permit. Absent disclosure of the requested records, the public's understanding will be shaped only by what is disclosed by the IDEQ and/or the City of Sandpoint which, in our opinion, are both historically compromised in providing intelligible, transparent rationales for decisionmaking implementing mandates of the federal Clean Water Act.

The records requested will contribute to public understanding of their government's role, or their "operations and activities" associated with decisionmaking and implementation of new numeric water quality standards for nutrients and the potential use of related variances from said standards. After disclosure of these records, the public's understanding of this project will be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(l)(3)(i).

LPOW has no commercial interest in the requested records. Nor does LPOW have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The requested records will be used for the furtherance of the LPOW’s educational mission to inform the public on matters of vital importance to the ecological and aesthetic quality of the Lake Pend Oreille River and Lake Pend Oreille, proper pollution regulation of the single largest local discharger of pollutants of concern, and in turn local waterbodies’ health and ability to support designated uses.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(3)(ii).

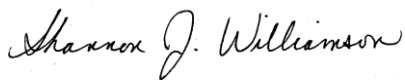
When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the “public interest” in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, LPOW has no commercial interest in the requested records. Disclosure of this information is not “primarily” in LPOW commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of EPA R10 decisions concerning water quality protection and pollution clean-up in Idaho. Because the public will be the primary beneficiary of this requested information, please waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4).

CONCLUSION

Please contact me via the information in the signature block below if additional information is necessary. LPOW requests that all communications not electronic in nature in response to this request be sent to its advocacy center’s mailing address at P.O. Box 732, Sandpoint, ID 83864.. Thank you for your consideration and prompt response to this request.

Sincerely,

A handwritten signature in cursive script that reads "Shannon J. Williamson".

Shannon Williamson, Ph.D.
Executive Director
Lake Pend Oreille Waterkeeper